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PESTECH SDN BHD v. MAYBANK ISLAMIC BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
NADZARIN WOK NORDIN J
[ORIGINATING SUMMONS NO: WA-24C-92-06-2023]
20 NOVEMBER 2023

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Abstract – *(i) A performance bond, by its express terms, is an irrevocable and unconditional bond. The performance bond is in itself an independent contract and is in reality a commercial practice term only, which is not tied to the performance of the underlying contract. This court is not to inquire into any breach of the underlying contract, where the bond is a demand bond; (ii) It is not automatic that where there is an application under s. 11 of the Arbitration Act 2005, the court is obliged to maintain the status quo of the matter pending arbitration. The court does maintain a measure of discretion of whether to grant the interim measure sought. However, in doing so, it must consider whether such interim measure will aid, support or facilitate the arbitral proceedings, and that such measure will not impede the arbitral proceedings.*

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CONTRACT: *Performance bond – Demand – Call on performance bond on basis of termination of subcontract – Whether performance bond an unconditional bond – Whether there was fraud or unconscionability in call made on performance bond – Whether performance bond an independent contract – Whether tied to performance of underlying contract – Whether performance bond valid – Whether courts could restrain call on performance bond*

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CIVIL PROCEDURE: *Injunction – Application for – Application for injunction to restrain call on performance bond pending disposal of arbitration proceedings – Call on performance bond on basis of termination of subcontract – Whether there was fraud or unconscionability in call made on performance bond – Whether court obliged to maintain status quo of matter pending arbitration – Whether injunctive relief could be obtained – Whether balance of convenience lay in upholding performance bond – Whether action for injunction dismissed*

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In the originating summons ('OS'), the plaintiff was, in accordance with s. 11(1)(a) and (b), s. 50 of the Arbitration Act 2005 ('Arbitration Act'), O. 69 and O. 29 r. 1 of the Rules of Court 2012 and s. 51 of the Specific Relief Act 1950 *vide* encl. 1 sought (i) an injunction to restrain, amongst others, the first defendant ('D1') from making payment of RM39,900,000 or a sum equivalent to it in any manner to the second defendant ('D2') under the performance bond issued by D1 to D2 ('performance bond') pending the disposal of the arbitral proceedings which had been commenced by the plaintiff against D2 ('arbitral proceedings') pending the parties resolving the

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dispute through mutual consultation and after the management committee had provided an opinion under condition 4.1 of the conditions of the subcontract; and (ii) an injunction against the second defendant ('D2') to restrain D2 from receiving and/or utilising any monies that may have been received by the D2 from D1 under the performance bond pending the disposal of the arbitral proceedings which would be initiated under condition 4.2 of the conditions of the subcontract if parties were unable to settle the dispute through mutual consultation and after the management committee had provided an opinion pursuant to condition 41.1 of the conditions of subcontract. The plaintiff was the subcontractor for, *inter alia*, the design, construction, supply and maintenance for a project ('project'). D2 was the main subcontractor. The plaintiff claimed it had carried out its works and submitted interim progress claims to D2. It was alleged by the plaintiff that at the request of D2 and representation that the plaintiff would be fully compensated for the materials purchased and placed at a warehouse and claimed that it had incurred significant costs out of pocket to purchase the said materials. The plaintiff subsequently issued a letter demanding for payment of RM15,516,443.75 being full compensation of materials stored at the warehouse and reserved its rights to claim further amounts for breach of contractual obligations which led to the negative project cash flow. D2 terminated the contract. In the midst of ongoing discussions between the parties, D2 made a call/demand on the performance bond for the entire bonded amount of RM39,900,000 on the purported basis that D2 had terminated the contract with the plaintiff. Hence, the plaintiff applied for this injunction. The plaintiff submitted that the aforesaid demand was without basis and was fraudulent and/or unconscionable for, *inter alia*, the following reasons (i) the plaintiff had, at all material times, carried out the works regularly and diligently pursuant to the terms and conditions of the subcontract and in compliance with the instructions given by D2; (ii) the purported termination of the subcontract was unlawful as it did not comply with the subcontract as the plaintiff was not insolvent; (iii) D2 had wrongfully terminated the subcontract by way of a notice of termination; (iv) D2 had proceeded unnecessarily to make a call/demand on the performance bond despite the fact that the plaintiff had not in any way failed to execute the subcontract or commit any breach of the obligations thereunder which warranted a call/demand on the performance bond; and (v) D2's call/demand on the performance bond was fraudulent and/or unconscionable. D2's position, however, was that the performance bond was an unconditional guarantee and was a distinct contract with D1 and the plaintiff could not seek to re-write the bargain of the distinct contract between D1 and D2 to be conflated with the limited exceptions of fraud/unconscionability to justify the injunction. In so far as D1 was concerned, they submitted, *inter alia*, that irrespective of the plaintiff's claim against D2, no injunctive relief ought to be granted against D1 as the performance bond was an unconditional bond.

Held (dismissing OS):

(1) This court could not summarily make any form of conclusion or decision as to the averments and contentions made by the parties. Under s. 11(1)(a) and (b) of the Arbitration Act under the OS, from an objective perspective, the issues raised were genuine disputes on issues of fact and of the subcontract, which were more suitable and appropriately to be ventilated and decided in a different and proper forum *ie*, the arbitration proceedings where the merits of the case of each party are to be finally determined. The said issues were not sufficient to come within the definition of fraud or unconscionable conduct as they were in fact disputes between the parties. Any form of remedies or recoveries or damages including that of the monies under the performance bond could be addressed and finally determined in the arbitration proceedings. (paras 51, 57 & 58)

(2) At this juncture, there was also no over securitisation when there was *prima facie* the plaintiff's claim against D2 for RM333 million allegedly for the total costs which D2 had to incur to complete the works, as compared to the performance bond value of RM39,900,000 and the alleged sum totalling RM52,416,121.31 presently held by the plaintiff, which did not include the use of the machineries which D2 was still retaining for use which were worth approximately around RM15 to RM20 million. All in the sum purportedly held by D2 would appear to be insufficient to cover the costs of the completion of the plaintiff's remaining works. (para 56)

(3) The performance bond was an unconditional demand bond and the call was properly made within the terms of the performance bond *ie*, on the basis of the termination of the subcontract under s. 39 of the said subcontract. In any event, it is not automatic that where there is an application under s. 11 of the Arbitration Act, the court is obliged to maintain the status *quo* of the matter pending arbitration. The court does maintain a measure of discretion of whether to grant the interim measure sought. The court, in doing so, must consider whether such interim measure would aid, support or facilitate the arbitral proceedings, and that such measure would not impede the arbitral proceedings. (paras 62 & 63)

(4) This court was not satisfied that the plaintiff had shown a suitable argument for a strong *prima facie* case being established before this court or that there was strong evidence before this court that either fraud or unconscionability had been shown such as to convince this court to grant an injunction to restrain payment on the performance bond as sought in the OS. On a balance of probabilities, the performance bond, by its express terms, was an irrevocable and unconditional bond and that the call or demand on the performance bond made by D2 to D1 was, at least

at this stage, shown to be *prima facie* properly made on the basis of the termination of the subcontract under s. 39 of the said subcontract, *albeit* the termination of the subcontract was disputed by the plaintiff and the said demand on the performance bond was also contested by the plaintiff. This would thus negate the contention that there was either fraud or unconscionability in the call made on the said performance bond. (paras 63 & 64)

(5) This court is not to inquire into any breach of the underlying contract, where the bond is a demand bond. This court rejected the argument that the issuance of the performance bond comes from the requirement under the contract as although this may be true to a certain extent, the law is clear that the performance bond is in itself an independent contract. The term 'performance bond' is in reality a commercial practice term only, which is not tied to the performance of the underlying contract. What is important is the terms of the performance bond which on the face of the performance bond herein, was a demand bond *ie* payable on demand. (paras 66 & 68)

(6) In so far as the action against D1, no injunctive relief could be obtained against D1, as the banker/issuer, where the demand on the performance bond had been held by this court to be valid. In the circumstances, the balance of convenience lay with D2 in upholding the performance bond. There was no necessity to maintain the *status quo* as the requirements of fraud or unconscionability had not been proven to this court. This court would not intervene to restrain the call on the performance bond and the action for an injunction against both D1 and D2 were therefore dismissed. (para 70)

Case(s) referred to:

AFS Engineering (M) Sdn Bhd v. MRCB Builders Sdn Bhd [2020] CLJU 1836; [2020] 1 LNS 1836 HC ***(refd)***

AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd [2021] SGCA 62 ***(refd)***

Chengaljati Sdn Bhd v. Turnpike Synergy Sdn Bhd & Anor [2019] CLJU 549; [2019] 1 LNS 549 HC ***(refd)***

Cobrain Holdings Sdn Bhd v. Expertise International A&I (M) Sdn Bhd & Ors [2015] 6 CLJ 312 HC ***(refd)***

Damai City Sdn Bhd v. MCC Overseas (M) Sdn Bhd & Other Appeals [2022] 9 CLJ 639 CA ***(refd)***

Dauphin Offshore Engineering & Trading Pte Ltd v. The Private Office Of HRH Sheikh Sultan Bin Khalifa Bin Zayed Al Nahyan [2000] 1 SLR 657 ***(refd)***

Daya CMT Sdn Bhd v. Yuk Tung Construction Sdn Bhd [2016] CLJU 649; [2016] 1 LNS 649 HC ***(refd)***

Dunggon Jaya Sdn Bhd v. Aeropod Sdn Bhd & Anor And Another Appeal [2019] 9 CLJ 734 CA ***(refd)***

Focal Asia Sdn Bhd & Anor v. Raja Noraini Raja Datuk Nong Chik & Anor [2009] CLJU 913; [2009] 1 LNS 913 HC ***(refd)***

Gumusut Kakap Semi-floating Production system (L) Ltd v. Sabah Shell Petroleum Co Ltd [2017] 1 LNS 945 HC ***(refd)***
Itramas Technology Sdn Bhd v. AmBank (M) Bhd & Anor [2009] CLJU 923; [2009] 1 LNS 92; [2009] CLJU 923; [2009] 1 LNS 92 HC ***(refd)***
JBE Properties Pte Ltd v. Gammon Pte Ltd [2010] SGCA 46 ***(refd)***
Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor [2009] 2 CLJ 1 FC ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***
Kejuruteraan Bintai Kindenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor [2011] 7 CLJ 442 CA ***(refd)***
KNM Process Systems Sdn Bhd v. Lukoil Uzbekistan Operating company LLC [2020] 1 LNS 479; [2020] 1 LNS 479 CA ***(dist)***
Lec Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor [2000] 3 CLJ 473 CA ***(refd)***
Malaysian Resources Corporation Bhd v. HSBC Bank Malaysia Bhd & Ors And Another Case [2019] CLJU 1158; [2019] 1 LNS 1158 HC ***(refd)***
MEB Technology Sdn Bhd v. Petrotechnic Engineering and Construction Sdn Bhd & Anor [2023] CLJU 650; [2023] 1 LNS 650 HC ***(refd)***
Panzana Enterprise Sdn Bhd v. Turnpike Synergy Sdn Bhd [2022] CLJU 1015; [2022] 1 LNS 1015 HC ***(refd)***
SME Majujaya Sdn Bhd & Anor v. Pembinaan Mitrajaya Sdn Bhd & Anor [2018] CLJU 1396; [2018] 1 LNS 1396 HC ***(refd)***
SN Akmida Holdings Sdn Bhd v. Ahmad Zaki Sdn Bhd [2020] 4 CLJ 564 HC ***(refd)***
Stern v. McArthur (1988) 165 CLR 489 ***(refd)***
Sumatec Engineering And Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd [2012] 3 CLJ 401 FC ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 11(1)(a), (b), 50
Rules of Court 2012, O. 69, O. 29 r. 1
Specific Relief Act 1950, s. 51

For the applicant - Rodney Gomez, Aarthi Jeyarah, Candice Shih Yuh Ru & Koay Kai Lih; M/s Shearn Delamore & Co
For the 1st defendant - Chia Oh Shen & Chan Yat Mun; M/s Lee Hishammuddin Allen & Gledhill
For the 2nd defendant - Felix Dorairaj, Logan Sabapathy, Chong Samuel-Man & Ariel Priyanka Francis; M/s Dorairaj, Low & Teh

Reported by Suhainah Wahiduddin

JUDGMENT
(encl. 1)

Nadzarin Wok Nordin J:

[1] In the originating summons ("OS") filed herein, the plaintiff is, in accordance with s. 11(1)(a) and (b) as well as s. 50 of the Arbitration Act 2005 and O. 69 and O. 29 r. 1 of the Rules of Court 2012 and s. 51 of the Specific Relief Act 1950 *vide* encl. 1 ("encl. 1") seeking for:

(i) an injunction to restrain amongst others the first defendant ("D1"), their directors, managers, officers, employees, servants, agents or otherwise from making payment of RM39,900,000 or a sum equivalent to it in any manner to the second defendant ("D2") under the performance bond dated 24 October 2018 reference no. 99060BGU6268793 issued by D1 to D2 ("performance bond") pending the disposal of the arbitral proceedings which has been commenced by the plaintiff against D2 ("arbitral proceedings") pending the parties resolving the dispute through mutual consultation and after the management committee has provided an opinion under condition 4.1 of the conditions of subcontract; and

(ii) an injunction against the second defendant ("D2") to restrain D2 the whether by themselves, or their directors, managers, officers, employees, servants, agents or otherwise howsoever from receiving and/or utilising any monies that may have been received by the D2 from D1 under the performance bond pending the disposal of the arbitral proceedings which will be initiated under condition 41.2 of the conditions of subcontract if parties are unable to settle the dispute through mutual consultation and after the management committee have provided an opinion pursuant to condition 41.1 of the conditions of subcontract.

[2] Briefly, the grounds in support of the OS are as follows:

(i) D1 received a call/demand *vide* D2's letter dated 7 June 2023 for the total sum of RM39,900,000 under the performance bond ("demand") which was only served by D2 to D1 on 8 June 2023;

(ii) the demand was made based on the termination clause under condition 39 of the conditions of subcontract, in which D2 had issued a purported notice of termination for default ("notice of termination") to the plaintiff on 10 May 2023, which the plaintiff has disputed *vide* its letter dated 9 June 2023;

(iii) the plaintiff had delayed responding to D2's notice of termination as the parties were in discussion with a view to amicably resolve the matter in which there have been several meetings and discussions that were ongoing with regards to various options on how to proceed with the completion of the works;

(iv) the aforesaid demand is without basis and is fraudulent and/or unconscionable for the following reasons:

(a) the plaintiff had at all material times carried out the works regularly and diligently pursuant to the terms and conditions of the subcontract and in compliance with the instructions given by D2;

A (b) the purported termination of the subcontract is unlawful as it does not comply with the subcontract as the plaintiff is not insolvent;

(c) D2 had wrongfully terminated the subcontract by way of a notice of termination dated 10 May 2023;

B (d) D2's *mala fide* actions and conducts caused the plaintiff to face negative project cash flow, details of which are as follows:

(1) D2 had demanded the plaintiff to purchase all the materials and directed that all materials must be purchased and placed on the site, on the understanding that the plaintiff would be fully C compensated for the same;

(2) D2 informed the plaintiff that they will only be able to fully compensate the materials provided the warehouse in which the materials were stored has been approved as being part of the project site;

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(3) D2 has not compensated the plaintiff to-date despite knowing that the plaintiff's warehouse had been designated as being part of the project site back in 27 February 2020;

(4) D2 had requested the plaintiff to carry out scope of works that E is not within the plaintiff's original scope of work namely the wiring works on migrated track, in which D2 had also wanted the plaintiff to increase manpower and machineries to do the same.

(e) the purported termination of the subcontract was motivated by bad F faith as the plaintiff had issued a letter dated 9 May 2023 claiming for the materials delivered and stored at the Taman Emas warehouse as the same was designated as being part of the project site since 27 February 2020;

G (f) D2 had proceeded unnecessarily to make a call/demand on the performance bond despite the fact that the plaintiff has not in any way failed to execute the subcontract or commit any breach of our obligations thereunder which warrants a call/demand on the performance bond;

H (g) D2 made a call/demand for the entire bonded amount despite the fact that D2 had never previously notified, let alone demanded, the plaintiff of any amounts to be paid by the plaintiff to D2;

(h) D2 has failed to certify the proper value of works done, wherein the shortfall of the amounts claimed and certified would amount to the I sum in the region of RM26,585,346;

(i) D2 entirely disregarded the fact that as at 10 May 2023, there was total retention sum of RM20,000,000 held by D2 which provided sufficient security for D2;

(j) D2 had failed to provide the appropriate extensions of time until 10 June 2024 and delayed the subcontract works for a substantial period of time through no fault of the plaintiff;

(k) D2 has failed to make payment of the prolongation cost by way of loss and expense;

(l) D2 did not give any prior notice to the plaintiff of D2's intention to call/demand on the performance bond and also did not notify the plaintiff at the time when the call/demand was made;

(m) D2's call/demand on the performance bond is fraudulent and/or unconscionable;

(n) D2 has not complied with the conditions of the performance bond in that the plaintiff has not failed to perform its obligations under the subcontract;

(o) in any case, the plaintiff is not in breach of the subcontract but rather the second defendant is.

(v) as such, the plaintiff prays for injunctive reliefs to restrain D1 from making any payment to D2 under the performance bond and to restrain D2 from receiving and/or utilising any monies that may have been received by D2 from D1 under the performance bond; and

(vi) this application is made pending the disposal of the arbitral proceedings.

[3] The *inter partes* hearing of the *ex parte* application under encl. 2 ("encl. 2") for the like prayers in encl. 1 save that the prayers for the injunction therein were only up to the disposal of encl. 1 herein is also fixed for decision together with encl. 1.

Background Facts

[4] The plaintiff is the subcontractor for the design, construction, supply, installation, completion, testing, commissioning, and maintenance for the "electrification systems of the electrified double track from Gemas to Johor Bahru" project. D2 is the main subcontractor.

[5] The plaintiff has alleged that it has carried out its works and submitted interim progress claims to D2.

[6] The original date of completion of the project was on 1 April 2021. There have been four EOTs granted by D2 revising the completion date to 1 June 2023, as follows:

(i) EOT 1 was granted till 29 April 2022;

A (ii) EOT 1 was granted till 1 March 2023;

(iii) EOT 1 was granted till 1 April 2023; and

(iv) EOT 1 was granted till 1 May 2023 and extended *vide* letter dated 15 April 2023 till 1 June 2023.

B **[7]** D2 has been granted EOT until June 2025 which included some of the plaintiff's scope of work. As such, the plaintiff contends that it should similarly be entitled to such corresponding EOT.

[8] The performance bond is valid till 29 April 2027, or in the case of termination under condition 39.2 of the COC, six months after the date of C termination which will be 9 November 2023.

[9] It is alleged by the plaintiff that at the request of D2 and representation that the plaintiff will be fully compensated for the materials purchased and placed at the Taman Emas warehouse, and claims that it had incurred D significant costs out of pocket to purchase the materials which are placed at the Taman Emas Warehouse in 2019.

[10] It is alleged by the plaintiff that on 27 February 2020, the MO approved the Taman Emas warehouse as being part of the project site, and since May 2020, D2 has been attending joint site valuations with the E Ministry of Transport (MOT) and ICC at the Taman Emas warehouse for purposes of verifying D2's progress claims to MOT which included the materials.

[11] It is further alleged by the plaintiff that D2 admitted that it was aware of the said MOT approval at least since 17 September 2020 but at no point F in time did D2 inform the plaintiff of said approval.

[12] The plaintiff contends that it became suspicious of the status of the Taman Emas warehouse around September 2020, and as such the plaintiff repeatedly followed up with D2 on the MOT's approval of said warehouse. D2 has by way of its letter dated 3 December 2020 categorically denied any G such approval by MOT.

[13] On or around April 2023, it is alleged by the plaintiff that by way of D2's email of 4 May 2023 (where a copy of the MOT's approval dated 27 February 2020 was attached to the email), it was confirmed that the H Taman Emas warehouse had been designated as part of the project site on 27 February 2020.

[14] The plaintiff subsequently issued a letter on 9 May 2023 demanding for payment of RM15,516,443.75 being full compensation of materials stored at the Taman Emas warehouse and reserved its rights to claim further I amounts for breach of contractual obligations which led to the negative project cash flow.

[15] D2 terminated the contract on 10 May 2023 (one day immediately after the issuance of the plaintiff's demand for compensation of the materials as set out above) on the basis of insolvency and purported events in 2020, 2022 alleged criminal action against an individual employed by the plaintiff, and events relating to additional migrating works which the parties had agreed to.

[16] Post-termination, parties were allegedly still discussing how the plaintiff could continue the works.

[17] On 9 June 2023, almost one month after the termination and in the midst of ongoing discussions between the parties, D2 had by way of a letter dated 7 June 2023, made a call/demand on the performance bond for the entire bonded amount of RM39,900,000 on the purported basis that D2 had terminated the contract with the plaintiff.

[18] Hence, the plaintiff had thereafter applied for this injunction herein.

Issues, Analysis And Findings Law

[19] The law in our jurisdiction as regards the grant of an injunction with regards a guarantee or performance bond has been laid out by our apex court in *Sumatec Engineering And Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd* [2012] 3 CLJ 401; [2012] 4 MLJ 1 where it was held:

> ... in the case of on demand letters of guarantee or performance bonds the courts are now more willing to look beyond the fraud exception and consider unconscionability as a separate and independent ground to allow for a restraining order on the beneficiary.

[20] In essence, this would mean that a person should not be permitted to use or insist upon his legal rights to take advantage of another's special vulnerability or misadventure for the unjust enrichment of himself quoting the Australian High Court decision of *Stern v. McArthur* (1988) 165 CLR 489 which was referred to in *Sumatec Engineering and Construction Sdn Bhd* (*supra*).

[21] To establish 'unconscionability' it was stated by the Federal Court *Sumatec Engineering and Construction Sdn Bhd* (*supra*) that:

> [39] We are of the considered view that the 'seriously arguable and realistic inference' test as used by the learned judicial commissioner in *Focal Asia* is equally applicable to the extended exception of unconscionability. That test therefore needs to be applied to the relevant material facts before the court. The same test which results in a 'strong *prima facie* case' was utilised by the Court of Appeal at the intermediate appeal stage. And the Court of Appeal said this of the required burden now rested on the shoulder of *Sumatec*:
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> > As in the case of fraud, *to establish 'unconscionability' there must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare assertion*

A (emphasis added). Hence, the respondent has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of 'unconscionability' which would basically mean establishing a strong *prima facie* case. In other words, the respondent has to place sufficient evidence before the court so as to enable the court to be satisfied, not necessarily
B beyond reasonable doubt, that a case of 'unconscionability' being committed by the beneficiary (the appellant) has been established to an extent sufficient for the court to be minded to order injunction sought. This additional ground of 'unconscionability' should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable
C and sensible man.

(emphasis added)

[22] In *Dunggon Jaya Sdn Bhd v. Aeropod Sdn Bhd & Anor And Another Appeal* [2019] 9 CLJ 734; [2019] 4 MLJ 466, the Court of Appeal had clarified that *Sumatec Engineering And Construction Sdn Bhd* (*supra*) had held that the test
D was whether sufficient evidence had been placed before the court to be satisfied, not necessarily beyond reasonable doubt, that 'unconscionability' has been established to the extent that the court was minded to make the order for an injunction. This was what was stated in *Dunggon Jaya Sdn Bhd* (*supra*):

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> [31] It is true, as contended by learned counsel for the first respondent, that these are unproven allegations by the appellant, but the test is not whether they are proven or otherwise but whether sufficient evidence had been placed before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of unconscionability had
F been established to an extent that is sufficient for the court to be minded to order the injunction sought: *Sumatec*.

[23] Learned counsel for D2 has urged this court to take into account *inter alia* that contractual disputes do not fall under the exception of 'unconscionability' as per *Sumatec* (*supra*) and *Daya CMT Sdn Bhd v. Yuk*
G *Tung Construction Sdn Bhd* [2016] CLJU 649; [2016] 1 LNS 649; *Chengaljati Sdn Bhd v. Turnpike Synergy Sdn Bhd & Anor* [2019] CLJU 549; [2019] 1 LNS 549; *Malaysian Resources Corporation Bhd v. HSBC Bank Malaysia Bhd & Ors And Another Case* [2019] CLJU 1158; [2019] 1 LNS 1158; *AFS Engineering (M) Sdn Bhd v. MRCB Builders Sdn Bhd* [2020] CLJU 1836; [2020] 1 LNS
H 1836; [2020] MLJU 2118; *Panzana Enterprise Sdn Bhd v. Turnpike Synergy Sdn Bhd* [2022] CLJU 1015; [2022] 1 LNS 1015; [2022] MLJU 1000; *MEB Technology Sdn Bhd v. Petrotechnic Engineering And Construction Sdn Bhd & Anor* [2023] CLJU 650; [2023] 1 LNS 650; [2023] MLJU 725 cases and that the termination of the contract or subcontract, as the case maybe, should
I be determined at the arbitration proceedings as per *SME Majujaya Sdn Bhd & Anor v. Pembinaan Mitrajaya Sdn Bhd & Anor* [2018] CLJU 1396; [2018] 1 LNS 1396; [2018] MLJU 1303.

[24] With regards the issue of 'fraud', it is trite that there must be clear and strong corroborative evidence of the same, see cases such as *Lec Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor* [2000] 3 CLJ 473; [2000] 3 MLJ 339 and *Itramas Technology Sdn Bhd v. AmBank (M) Bhd & Anor* [2009] CLJU 923; [2009] 1 LNS 92; [2009] MLJU 855.

[25] The case of *Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 195 lays out the law with regards the test to be met in granting an injunction which are:

(i) whether there is any *bona fide* serious issue to be tried;

(ii) whether damages are an adequate remedy; and

(iii) where the balance of convenience lies.

[26] My approach to the case before me must thus be based on the aforementioned Malaysian case authorities/precedents.

[27] Accordingly, there must thus be a strong *prima facie* case established such that it pricks the conscience of a reasonable man, that the unconscionable conduct complained of has been placed before the court or that an act of fraud has been occasioned, so as to satisfy this court that an order for injunction ought to be granted. Unconscionability is also not limited to fraud *per se* as the sole and distinct basis or ground for an injunction of the type sought herein.

[28] With regards the law on a performance bond, I accept that the law on this is settled, in that that the performance bond is subject to the principle of autonomy *ie*, the document is to be kept separate from the underlying contract as per Mohamed Ariff J (as he then was) in *Focal Asia Sdn Bhd & Anor v. Raja Noraini Raja Datuk Nong Chik & Anor* [2009] CLJU 913; [2009] 1 LNS 913 and the Federal Court in *Sumatec* (*supra*) as well as the High Court cases of *Cobrain Holdings Sdn Bhd v. Expertise International A&I (M) Sdn Bhd & Ors* [2015] 6 CLJ 312; [2015] 11 MLJ 339 and *Gumusut Kakap Semi-floating Production system (L) Ltd v. Sabah Shell Petroleum Co Ltd* [2017] 1 LNS 945 where in the latter case, the learned judge therein, Lee Swee Seng J (now JCA) held that the courts should not interfere with the allocation of risks *ie*, where the performance bond is to operate as a risk allocation device pending final determination of the dispute between the parties, by importing a precondition into an unconditional on demand bond.

[29] Having laid out the law in general, I will now turn to the issues and the facts of the case before me.

Issues

[30] There were lengthy arguments and exchange of affidavits by both the plaintiff and D2 before this court. In essence, the plaintiff submits that:

(i) the termination of the performance bond was made in bad faith;

(ii) it was D2's breach of the contract which led to the negative cash flow;

(iii) there has been an over securitisation; and

(iv) the conduct post termination of D2 will show that there is fraud or unconscionable conduct on the part of D2.

[31] D2's position is briefly as follows:

(i) the performance bond is an unconditional guarantee and is a distinct contract with D1;

(ii) a distinct forum is to determine the differences or dispute under the subcontract;

(iii) the plaintiff cannot seek to rewrite the bargain of the distinct contract between D1 and D2 to be conflated with the limited exceptions of fraud/unconscionability to justify the injunction; and

(iv) there should not be a mini trial on merits to determine the issue of unconscionability which burden rests on the plaintiff.

[32] In so far as D1 is concerned they have *inter alia* submitted that:

(i) irrespective of the merits of the plaintiff's claim against D2, no injunctive relief ought to be granted against D1 as the performance bond is an unconditional bond; and

(ii) D2 never had any notice of any fraud prior to the receipt of D2's demand.

Analysis Of Factual Matrix

[33] This court will firstly deal with the salient parts of the factual matrix of the matter which I believe may play a part in deciding encl. 1 of the OS and which I might add has differences depending on the perspective of each party.

[34] From the records before me, I have observed that:

(i) there were four extensions of time (EOT) granted by D2 to the plaintiff with the last EOT granted up to 1 June 2023;

(ii) that the subcontract was terminated by D2 on 10 May 2023; and

(iii) D2 was allegedly given an EOT by the Government to June 2025 of which D2 disputes but have not disclosed when they were given the EOT or the date of the EOT.

[35] As regards the terms of the performance bond, I have after reading the same found that:

(i) it was originally, as seen from the third amendment letter dated 14 April 2021 from D1 to D2, valid till 29 April 2027, but due to the termination of the said subcontract between the parties, the performance bond will now expire six months from the termination date of the subcontract *ie*, on 9 November 2023;

(ii) is by the express terms therein continuing, absolute, unconditional and irrevocable;

(iii) is payable upon first written demand up to and not exceeding the sum of RM39,900,000 and stating that in D2's "sole and absolute judgment the subcontractor has failed to observe or perform any of the terms, conditions or provisions of the subcontract on its part to be observed or performed or the subcontractor's employment has been terminated under s. 39 of the subcontract

(iv) is payable 'irrespective of the occurrence of any circumstances which might otherwise constitute a legal or equitable defence';

(v) shall not be affected or discharged by any dispute or disagreement whatsoever under or in relation to the subcontract; and

(vi) was called or demanded upon by D2 to D1 *via* a letter dated 7 June 2023.

[36] I have also looked at the notice of termination dated 10 May 2023, at exh. P-22, and find that it made *inter alia* reference to:

(i) an insolvency event under the conditions of subcontract limb I, f and g of the condition 39.2(A), repudiation by the subcontractor as per limb iii of the condition 39.2(A) and breach of representations, warranties or undertaking by reference to condition 48.14 as set out in limb viii of the condition 39.2(A);

(ii) D2 assisting the plaintiff with its cash flow from July 2020 to August 2022, July 2022 to February 2023, and in August 2022;

(iii) criminal charges under the Penal Code against the executive chairman and CEO of the plaintiff's parent company, Pestech International Berhad as well as on one Paismanathan Govindasamy for alleged dishonest appropriation of property;

(iv) the plaintiff's default in payment to its subcontractors;

(v) failure to make payment to KTMB for renewal of permits resulting in works at the migrated lines coming to a standstill;

(vi) the negative impact on the progress of works due to the above; and

(vii) the refusal to allow access to inspect and audit materials in the Taman Emas Warehouse.

[37] I have further examined the call or demand dated 7 June 2023 on the performance bond made by D2 to D1, at exh. P28 and observed that it states:

> Pursuant to the terms of the Bond, we hereby make a demand for a total sum of Ringgit Malaysia Thirty-Nine Million Nine Hundred Thousand only...as the subcontractors ... employment has been terminated under s. 39 of the subcontract in accordance with the terms of the Bond, you are required to immediately pay the said sum to us by bankers cheque ...

[38] It is also in the records that the plaintiff had objected to the said notice of termination *vide* various emails dated 10 May 2023, 15 May 2023, 16 May 2023, 19 May 2023 and 30 May 2023 as shown in exh. P-26, and to the call or demand dated 7 June 2023 on the performance bond by way of a letter dated 9 June 2023 to D1 in exh. P-29 outlining therein *inter alia* the same issues raised in the OS herein.

[39] In dealing with the contention that the purported termination was made in bad faith, this court was urged to consider that D2 did not make out a case for insolvency on the part of the plaintiff at the time of the notice of termination and that the plaintiff's financial standing did not affect the progress of the works, which was at an advanced stage of almost 70% completed.

[40] The plaintiff also submits that there were in fact no actual advance payments by D2 as alleged by D2 and attempted to aver as well as provide evidence to that effect such as D2's failure to compensate them for the materials and D2's instructions to carry additional migrating works which are not within the plaintiff's original scope of works. It is also alleged by the plaintiff that the criminal charges mentioned in the notice of termination is no longer an issue as the said officers have been discharged and acquitted.

[41] It was further contended that D2's breach of the subcontract had led to the plaintiff's negative project cash flow situation for example their failure to compensate the plaintiff for the materials delivered on site, wrongfully rejecting the plaintiff's EOT applications as well as claims for loss and expense thereto, and under certification of the plaintiff's works.

[42] It was also argued by the plaintiff that D2 was attempting after the notice of termination, *via* discussions between the parties, to secure an alternative commercial arrangement with the plaintiff that was in their favour rather than adhering to the contract and that there was an over securitisation of the plaintiff's assets by D2 totalling RM52,416,121,31 presently held by the plaintiff, not including the use of the machineries which D2 is still retaining for use which are worth approximately around RM15 to RM20 million.

[43] Thus, the plaintiff submits that it would be unjust and an over securitisation to allow D2 to call on the performance bond when there is no loss or damage suffered by D2 especially so when the performance bond was still valid for another six months *ie*, till 9 November 2023.

[44] Learned counsel for the plaintiff then urges this court grant the injunction sought and to consider:

(i) the conduct post termination of D2 *vis-a-vis* the discussions between the parties, to secure an alternative commercial arrangement;

(ii) that D2 was aware that the plaintiff had a new shareholder, IJM Corporation Berhad who is D2's competitor, and that D2 wanted to stifle the competition;

(iii) the notice of termination had stated that they will notify the plaintiff of a joint valuation date to assess the value of works done however none was forthcoming;

(iv) that D2 had prematurely thereafter called on the performance bond;

(v) D2 was still retaining the plaintiff's retention monies and machineries;

(vi) the sole motivation for terminating the subcontract was that the plaintiff had got hold of proof of D2 lying to the plaintiff regarding the MOT approval re the Taman Emas Warehouse *ie*, the suppression of the MOT approval; and

(vii) D2's failure to fully compensate the plaintiff for the materials.

[45] In reply to the said contention that the purported termination was made in bad faith, D2 stated that based on the objective facts before this court, it can be shown that D2 and/or the PIB Group were having internal cash follow problems.

[46] D2 then submits that the allegation of materials housed in the Taman Emas warehouse, the past advances allegedly taken, the EOT's, loss and expense claims, the under certification, the additional migrating works, the progress of works, the issue of the plaintiff's insolvency, the notice of termination, post termination discussions and the call on the performance bond are all disputes which either concern issues of fact and/or the interpretation of the subcontract.

[47] D2 has also attempted to clarify as well as give their version of the facts from their position and perspective *via* their various affidavits before this court and in both their written and oral submissions before me.

[48] Be that as it may, learned counsel for D2 argues that all of the above are issues which belong in the arbitration.

[49] It is pivotal in coming to my decision that this court does not, at this stage, make any definite determination as whether the disputes or issues raised by the plaintiff are meritorious or otherwise, as per the case of *Dauphin Offshore Engineering & Trading Pte Ltd v. The Private Office Of HRH Sheikh Sultan Bin Khalifa Bin Zayed Al Nahyan* [2000] 1 SLR 657 and *KNM Process Systems Sdn Bhd v. Lukoil Uzbekistan Operating company LLC* [2020] 1 LNS 479; [2020] 1 LNS 479.

[50] It is axiomatic that the burden to discharge the 'strong *prima facie'* case is a high threshold which has to be fulfilled to establish 'unconscionably' and requires proof of 'cogent evidence'.

[51] I must also state that I have noted that the plaintiff has highlighted that the plaintiff has invoked the dispute resolution mechanism provided in the subcontract but the parties have failed to resolve the dispute and that the plaintiff was reserving its rights to refer the dispute to arbitration at the appropriate juncture and that the relief in the OS herein was primarily for the purpose of maintaining the *status quo* between the parties pending the matter being resolved or finally determined by arbitration.

[52] After carefully considering and reviewing the respective evidence and submissions on all of these issues raised above, this court holds that it cannot summarily, based on my reasons in my grounds herein, make any form of conclusion or decisions as to the averments and contentions made by the parties, in particular that of the plaintiff herein of: (i) D2 not making out a case for insolvency on the part of the plaintiff at the time of the notice of termination; (ii) the purported termination being made in bad faith including the fact that that D2 did not make out a case for insolvency on the part of the plaintiff at the time of the notice of termination or; (iii) whether D2's breach of the subcontract which led to the plaintiff's negative project cash flow situation, that (iv) D2 was attempting after the notice of termination, *via* discussions between the parties, to secure a favourable alternative commercial arrangement with the plaintiff.

[53] As to the issue of whether there was an over securitisation of the plaintiff's assets by D2, I have looked at the facts before me *in toto* and I do not find that there is an over securitisation as contended by the plaintiff. The basis of such an allegation appears to be that D2 has not made any assessment of their purported losses or damage at the time of the notice of termination or the demand on the performance bond and that there is no basis for the RM333 million claimed by D2 against the plaintiff for the total costs which D2 has to incur to complete the plaintiff's works.

[54] The plaintiff further states that D2 has retention sums of RM20 million and that from the balance due to the plaintiff for material and equipment delivery as well as prolongation costs and under certification in IPC 51, there is a sum totalling RM52,416,121,31 presently held by the plaintiff, not including the use of the machineries which D2 is still retaining for use which are worth approximately around RM15 to RM20 million.

[55] I have looked at the cases cited by the plaintiff in support of their assertion of over securitisation which consists of the Singapore case of *JBE Properties Pte Ltd v. Gammon Pte Ltd* [2010] SGCA 46; [2011] 2 SLR 47 and the Malaysian cases of *SN Akmida Holdings Sdn Bhd v. Ahmad Zaki Sdn Bhd* [2020] 4 CLJ 564; [2020] MLJU 115; [2020] 9 MLJ 137 and *Damai City Sdn Bhd v. MCC Overseas (M) Sdn Bhd & Other Appeals* [2022] 9 CLJ 639; [2023] 1 MLJ 258 and find that *JBE Properties Pte Ltd* (*supra*) was decided on the fact that the bond therein was a true indemnity performance bond and in *SN Akmida Holdings Sdn Bhd* (*supra*) the case was decided on its facts which included that the bond was subject to the issuance of a written certificate, whereas in *Damai City Sdn Bhd* (*supra*) the decision of the Court of Appeal was made on the basis that the High Court having made a finding of an unconditional on demand bond, had failed to appreciate that the call was lawful.

[56] Based on the preliminary facts before me, I do not at this juncture, find any over securitisation when there is *prima facie* the plaintiff's claim against D2 for RM333 million allegedly for the total costs which D2 has to incur to complete the works, as per D2's averment in its affidavit at encl. 41, as compared to the performance bond value of RM39,900,000 and the alleged sum totalling RM52,416,121,31 presently held by the plaintiff, which does not include the use of the machineries which D2 is still retaining for use which are worth approximately around RM15 to RM20 million. All in the sum purportedly held by D2 would appear to be insufficient to cover the costs of the completion of the plaintiff's remaining works.

[57] I have consequently given due and proper regard of the application under s. 11(1)(a) and (b) of the Arbitration Act 2005 under the OS before me and am of the view, from an objective perspective, that these issues are genuine disputes on issues of fact and of the subcontract which I hold are more suitable and appropriately to be ventilated and decided in a different and proper forum *ie*, the arbitration proceedings where the merits of the case of each party is to be finally determined.

[58] I also hold that the said issues are not sufficient to come within the definition of fraud or unconscionable conduct as they are in fact disputes between the parties. Any form of remedies or recoveries or damages including that of the monies under the performance bond can be addressed and finally determined in the arbitration proceedings. I rely on the judgment of the Court of Appeal in *KNM Process Systems Sdn Bhd v. Lukoil Uzbekistan Operating company LLC* [2020] CLJU 479; [2020] 1 LNS 479; [2020] MLJU 85 in which Mary Lim CJA (as she then was) had on behalf of the Court of Appeal with regards recognising unconscionability as a separate and independent ground" to allow for a restraining order on the beneficiary held *inter alia*:

A [56] We agree with the respondent's submissions that the threshold is high as the underlying disputes between the parties are essentially contractual in nature and those disputes are to be determined in arbitration. Thus, the court must guard against abuses of process where contractual disputes are elevated and disguised as claims of fraud or unconscionability.

B **[59]** In any event I am fully aware, from the Companies Commission Malaysia search report that D2 is financially strong to make good the amount of the performance bond if so warranted and this has played partly in my decision herein.

C **[60]** I have considered and read the case of *KNM Process Systems Sdn Bhd* (*supra*) which learned counsel for the plaintiff submits in support of their contention that *status quo* pending arbitration should be preserved and find that the same was decided on the basis of the facts before that court *ie*, that there were two underlying contracts between the parties with both contracts D contain provisions for guarantees of different total amounts but that the respondent had issued simultaneous demands on all three guarantees and that the challenge on the said guarantees were premised on amongst others as follows:

(i) the guarantee for refund of advance payment under the Gissar main E contract was not an unconditional demand bond;

(ii) the calls were not in compliance with the terms of the Gissar main contract;

(iii) in any event, the call was only available upon termination and that did F not arise in the instant case;

(iv) contemporaneous evidence and conduct of the parties, especially the respondent shows that there was no objective entitlement on the part of the respondent to make a call on the guarantees and that the respondent in fact knew that it was not entitled to make the call;

G (v) in relation to the Khauzak main contract, the respondent had already agreed that following multiple extensions of the warranty guarantee with the last extension until 31 October 2017 pending the appellant attending to some miscellaneous matters under the warranty period, there would be no further extensions and the warranty guarantee would be returned H to the appellant; and

(vi) the fact of simultaneous calls on the guarantees issued under two unrelated and independent contracts.

[61] It is therefore clear in my view that *KNM Process Systems Sdn Bhd* I (*supra*) was decided based on its peculiar facts and that the same is not applicable in the case before me, as *inter alia* the performance bond herein

before this court is an unconditional demand bond and the call was properly made within the terms of the performance bond *ie*, the on the basis of the termination of the subcontract under s. 39 of the said subcontract.

[62] In any event, I am of the considered opinion it is not automatic that where there is an application under s. 11 of the Arbitration Act 2005 the court is obliged to maintain the *status quo* of the matter pending arbitration. The court does, as was stated by the Court of Appeal in *KNM Process Systems Sdn Bhd* (*supra*), maintain a measure of discretion of whether to grant the interim measure sought. The court in doing so must consider whether such interim measure will aid, support or facilitate the arbitral proceedings, and that such measure will not impede the arbitral proceedings.

[63] I am therefore, with the greatest of respect, not satisfied that the plaintiff has shown a suitable argument for a strong *prima facie* case being established before this court or that there is strong evidence before this court that either fraud or unconscionability has been shown such as to convince this court to grant an injunction to restrain payment on the performance bond as sought for in the OS.

[64] Thus, I do find on a balance of probabilities that the performance bond, by its express terms, is an irrevocable and unconditional bond and that the the call or demand on the performance bond made by D2 to D1 was, at least at this stage, shown to be *prima facie* properly made on the basis of the termination of the subcontract under s. 39 of the said subcontract, *albeit* the termination of the subcontract is disputed by the plaintiff and the said demand on the performance bond is also contested by the plaintiff. This would thus negate the contention that there was either fraud or unconscionability in the call made on the said performance bond.

[65] This court consequently notes that D2 had issued the LOD 1 day before termination, para 6.11. On this I find that this is also a 'dispute' and does not amount to strong cogent evidence which amounts to 'unconscionability'. At its highest, this would only show that D2 had hastily terminated the subcontract without giving the plaintiff the chance to respond to the LOD 1 and that this, together with the termination of the subcontract, are consequently issues to be dealt with and decided in the arbitration proceedings.

[66] I am reminded of the fact and do apply the principle that the court is not to inquire into any breach of the underlying contract where the bond is a demand bond as per *Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor* [2009] 2 CLJ 1; [2008] 6 MLJ 636 where the Federal Court held:

> The courts in an on demand type bond will not inquire into any breach in the underlying contract. This principle can be found in the case of *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 where it was held that:

> Dealing further with the construction of the performance bond, since we found it was an on demand performance bond, this would, in our view, make the present performance bonds independent of any underlying concept ... On the type of such pure on demand performance bonds, the issuer should unquestionably pay on demand except in the case of fraud. Any argument or immediate disadvantage to the party who caused such a document to be in use is of no avail to the party who must face the risks of such unquestioned payment except where there is fraud; there was even no allegation of it, let alone any evidence of it.

[67] At the risk of repetition, the dispute on the termination of the subcontract and the demand on the performance bond are matters to be determined at the arbitration proceedings.

[68] I consequently reject the argument that the issuance of the performance bond comes from the requirement under the contract as although this may be true to a certain extent, the law is clear that the performance bond is in itself fact an independent contract. The term "performance bond" is in reality a commercial practice term only, which is not tied to the performance of the underlying contract, see *AXA Insurance Pte Ltd v. Chiu Teng Construction Co Pte Ltd* [2021] SGCA 62; [2021] 2 SLR 549, and that what is important is the terms of the performance bond which on the face of the performance bond herein, is a demand bond *ie*, payable on demand.

Case Against D1

[69] In so far as the action against D1, this court holds in accordance with the case of *Kejuruteraan Bintai Kindenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442 that no injunctive relief can be obtained against D1, as the banker/issuer, where the demand on the performance bond has been held by this court to be valid. The Court of Appeal had in *Kejuruteraan Bintai Kidenko Sdn Bhd* (*supra*) held as follows:

> [71] The law on this issue is well-settled, locally as well as overseas: *ie*, if the performance bond is on demand and unconditional in nature, it is independent of any underlying contract between the parties; it is not open to the court to inquire into any breach of such underlying contract; and the bank/issuer is obliged to pay the beneficiary without any proof or condition, and notwithstanding any contestation or protest from any party. What is required is a valid demand in writing as stipulated in the guarantee agreement. Under such circumstances no injunctive relief can be granted to restrain the bank/issuer from making such payment to the beneficiary as demanded. The only exception to this rule is on the ground of fraud of which the bank/issuer has notice. The fraud must be on the performance bond itself and not the other documents. (see: *Esso Petroleum Malaysia Inc.* (*supra*); *LEC Contractors* (*supra*); and *Patel Holdings Sdn Bhd*

Estet Pekebun Kecil Sdn Bhd & Anor [1989] 1 CLJ 229; [1989] 2 CLJ (Rep) 215). The question of "unconscionability" does not arise and should not be an exception to the rule.

Decision

[70] In the circumstances, I do hold that the balance of convenience lies with D2 in upholding the performance bond and that there is no necessity to maintain the *status quo* as the requirements of fraud or unconscionability has not been proven to this court.

[71] The issue of any adverse effect to the commercial and reputation of the plaintiff is in my view wholly untenable as it is at most marginal.

[72] This court will accordingly not intervene to restrain the call on the performance bond herein and the action for an injunction against both D1 and D2 in both encls. 1 and 2 are therefore hereby dismissed with costs.